

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JENNIFER L. MAIORANA**

Claimant

VS.

**THREE RIVERS, INC.**

Respondent

AND

**FARM BUREAU PROPERTY &  
CASUALTY INS. CO.**

Insurance Carrier

Docket No. 1,049,343

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the November 9, 2011, Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant is entitled to medical care and designated Dr. Joseph Sankoorikal as her authorized treating physician. The ALJ further found that respondent should pay claimant temporary total disability benefits for the period from August 3, 2011, until claimant is released to return to work. The ALJ also found that any credit respondent may be seeking for overpayment of temporary total disability benefits would be taken up at the time of the final award.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 9, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

### ISSUES

Respondent contends the ALJ was without jurisdiction to include in her Preliminary Hearing Order the authorization of Dr. Sankoorikal as claimant's authorized physician. Respondent also argues that claimant presented no evidence to support her entitlement to temporary total disability benefits from August 3, 2011, through September 24, 2011. Respondent also claims it is not asking for a credit for overpayment of temporary total disability benefits as there has been no determination of what benefit claimant is entitled to for the period from May 2, 2011, through August 2, 2011. Respondent contends that since the payments were voluntary, there is no prohibition against considering those payments as a pre-payment of benefits.

Claimant asserts that the ALJ had jurisdiction to authorize Dr. Sankoorikal as claimant's authorized treating physician. Claimant also contends the issue concerning temporary total disability benefits is not one the Board may review from a preliminary hearing order. In the alternative, claimant argues her lifting restriction precludes her returning to work at respondent and also respondent has not been offered accommodated employment within her lifting restriction. Claimant also contends the ALJ correctly found that any credit for overpayment of temporary total disability benefits can occur only at the time of the final award. Accordingly, claimant asks the Board to affirm the Preliminary Hearing Order in its entirety.

The issue for the Board's review is:

- (1) Did the ALJ have jurisdiction to designate Dr. Sankoorikal as claimant's authorized treating physician?
- (2) Is claimant entitled to temporary total disability benefits from the period from August 3, 2011, through September 24, 2011?
- (3) Should respondent's voluntary payment of temporary total disability benefits from May 2, 2011, through August 3, 2011, be considered a pre-payment of benefits or must respondent wait until the time of the final award and ask for a credit for overpayment of temporary total disability benefits?
- (4) Does the Board have jurisdiction to consider any of the above issues in an appeal from a Preliminary Hearing Order?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges she injured her neck while working for respondent on August 19, 2009, when she fell from a chair. Respondent authorized Dr. Sankoorikal to be her authorized treating physician. On October 19, 2011, claimant filed her Application for Preliminary Hearing, attaching a seven-day demand letter requesting "resumption of

temporary total disability benefits and for authorization of Dr. Sankoorikal to provide additional medical treatment.” At the preliminary hearing, the following discussion was held before testimony was taken from the claimant:

JUDGE SANDERS: It [is] my understanding the Claimant is requesting temporary total. Dr. Sankoorikal is authorized to provide the trigger point injections. Is that correct, Mr. Crowley?

MR. CROWLEY [respondent’s attorney]: That is correct, Your Honor.

JUDGE SANDERS: The real issue is whether temporary total should be paid from what date, Ms. Fisher?

MS. FISHER [claimant’s attorney]: From when it was cut off which was August the 2nd.

....  
JUDGE SANDERS: And then there was also the issue of temporary total being an overpayment. Is that something you want to deal with today or you want to save . . . that for an award?

MR. CROWLEY: We consider that under the circumstances if the court orders temporary disability that that be a prepayment of temporary disability that would be ordered.

....  
MS. FISHER: . . . You know, to tell you the truth, I didn’t know he [Mr. Crowley] was gonna agree to the trigger points for sure. I point out to you probably the only thing that’s relevant since he’s agreed to the trigger points is, one, they are recommending the trigger points, then the restrictions right there.<sup>1</sup>

Thereafter, claimant gave testimony concerning her restrictions and ability to return to work.

The Board’s review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>2</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>3</sup>

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<sup>1</sup> P.H. Trans. at 4-6.

<sup>2</sup> K.S.A. 2010 Supp. 44-551.

<sup>3</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>4</sup>

Respondent first alleges the ALJ exceeded her jurisdiction in designating Dr. Sankoorikal to be claimant's authorized treating physician. Respondent's argues it had already authorized Dr. Sankoorikal as claimant's treating physician and there was no evidence or argument contesting the authorization of Dr. Sankoorikal at the preliminary hearing. After a review of this file, this Board Member does not find any evidence that the ALJ exceeded her jurisdiction in designating Dr. Sankoorikal as the treating physician. Further, this Board Member holds this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing order. ALJs must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.<sup>5</sup>

Respondent next argues the ALJ exceeded her authority by awarding temporary total disability benefits for the period of August 3, 2011, through September 25, 2011. The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

Respondent also contends its payment of temporary total disability benefits from May 2, 2011, through August 2, 2011, was a voluntary pre-payment for any temporary total disability benefits properly awarded. In the ALJ's Preliminary Hearing Order, she stated: "If Respondent is seeking a credit for overpayment of temporary total benefits, that is an issue taken up at the time of final award."<sup>6</sup> This issue is not one listed in K.S.A. 44-534a(a)(2) and the Board, therefore, has no jurisdiction over the issue in an appeal from a preliminary hearing order.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and

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<sup>4</sup>See K.S.A. 2009 Supp. 44-551.

<sup>5</sup>K.S.A. 2010 Supp. 44-510h(a).

<sup>6</sup>ALJ Preliminary Hearing Order (Nov. 9, 2011) at 2.

make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>7</sup>

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>8</sup> Accordingly, respondent and carrier's appeal is dismissed.

Respondent may preserve these issues for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

**WHEREFORE**, it is the finding of the Board that the respondent's appeal is dismissed and Administrative Law Judge Rebecca A. Sanders Preliminary Hearing Order dated November 9, 2011, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2012.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier  
Rebecca A. Sanders, Administrative Law Judge

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<sup>7</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

<sup>8</sup> *See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).